FILED
AUG 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1221

# In the Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,

*Petitioner*,

v.

ELLEN MENDELSOHN,

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
SHANE BRENNAN
*National Chamber Litigation Center, Inc.*
*1615 H Street, N.W.*
*Washington, DC 20062*
*(202) 463-5537*

EVAN M. TAGER
*Counsel of Record*
ARCHIS A. PARASHARAMI
*Mayer, Brown, Rowe & Maw LLP*
*1909 K Street, NW*
*Washington, DC 20006*
*(202) 263-3000*

*Counsel for Amicus Curiae*
*Chamber of Commerce of the United States of America*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## TABLE OF CONTENTS


**Page**

TABLE OF AUTHORITIES ..... ii

INTEREST OF THE *AMICUS CURIAE* ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 4

I. Testimony By Non-Party Employees Who Allege That They Were Discriminated Against Is Inadmissible In Individual Disparate-Treatment Lawsuits. ..... 4

A. "Me, Too" Evidence Is Irrelevant In The Context Of Individual Employment Claims. ..... 4

B. Even If "Me, Too" Evidence Has Marginal Relevance, Federal Rule Of Evidence 403 Generally Requires Exclusion Of Such Evidence In Individual Disparate-Treatment Cases. ..... 9

II. Allowing Non-Parties To Testify About Alleged Discrimination Raises Concerns About Fundamental Fairness Because Such Testimony Invites Juries To Base Liability On Perceived Harms To Persons Other Than The Plaintiff. ..... 14

III. Allowing The Use of "Me, Too" Evidence Will Force Companies To Adopt Less Efficient Management Practices. ..... 15

CONCLUSION ..... 18

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, *cert. granted*, 127 S. Ct. 852, *cert. dismissed*, 127 S. Ct. 1931 (2007) ..... 1

*Braswell v. United States*, 487 U.S. 99 (1988) ..... 5

*Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998) ..... 10

*Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) ..... 5

*Burlington Northern & Santa Fe Railway v. White*, 126 S. Ct. 2405 (2006) ..... 1

*CFTC v. Weintraub*, 471 U.S. 343 (1985) ..... 5

*Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) ..... 13

*Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984) ..... 8, 9

*Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006) ..... 1

*Federal Express Corp. v. Holowecki*, *cert. granted*, 127 S. Ct. 2914 (2007) ..... 1

*Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984) ..... 6

*Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) ..... 4

*Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) ..... 1

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ..... 8

*Monroe v. Children's Home Ass'n of Ill.*, 128 F.3d 591 (7th Cir. 1997) ..... 13

## TABLE OF AUTHORITIES—continued

**Page(s)**

*Moorhouse v. Boeing Co.*,
501 F. Supp. 390 (E.D. Pa.), *aff'd*,
639 F.2d 774 (3d Cir. 1980) (table) ..... 10

*Palsgraf v. Long Island R.R.*,
162 N.E. 99 (N.Y. 1928) ..... 7

*Philip Morris USA v. Williams*,
127 S. Ct. 1057 (2007) ..... 3, 14, 15

*Price Waterhouse v. Hopkins*,
490 U.S. 228 (1989) ..... 4, 5

*Reeves v. Sanderson Plumbing Prods., Inc.*,
530 U.S. 133 (2000) ..... 4, 6

*Robinson v. Sheriff of Cook County*,
167 F.3d 1155 (7th Cir. 1999) ..... 10

*State Farm Mut. Auto. Ins. Co. v. Campbell*,
538 U.S. 408 (2003) ..... 15

*Teamsters v. United States*, 431 U.S. 324 (1977) ..... 8, 9

*Turlington v. Atlanta Gas Light Co.*,
135 F.3d 1428 (11th Cir.),
*cert. denied*, 525 U.S. 962 (1998) ..... 13

### STATUTES, RULES AND REGULATIONS

42 U.S.C. § 1981a(b)(3)(D) ..... 13

Sup. Ct. R. 37.6 ..... 1

Fed. R. Evid. 401 ..... 5, 6, 8

Fed. R. Evid. 402 ..... 8

Fed. R. Evid. 403 ..... 2, 3, 9, 14

### MISCELLANEOUS

BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (3d ed. 1996) ..... 8

## TABLE OF AUTHORITIES—continued

**Page(s)**

JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE (2d ed. 2007) ..... 5

2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS ..... 2

Kenneth J. Arrow, *Control in Large Organizations*, 10 MGMT. SCI. 397 (Apr. 1964) ..... 17

Charles C. Warner, *Motions in Limine in Employment Discrimination Litigation*, 29 U. MEM. L. REV. 823 (1999) ..... 12

Hanna, Brophy, MacLean, McAleer, & Jensen, LLP, *U.S. Supreme Court will be final arbiter of "me-too" evidence in discrimination trials*, at http://www.hannabrophy.com/index.cfm?fuseaction=content.contentDetail&ID=8630&tID=297 (last visited Aug. 17, 2007) ..... 11

Michael Orey, *Fear of Firing: How the threat of litigation is making companies skittish about axing problem workers*, BUS. WEEK (Apr. 23, 2007) ..... 16, 17

POLLOCK, THE LAW OF TORTS (11th ed. 1920) ..... 7

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

### INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3 million businesses and organizations of all sizes.[1] Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the Nation's business community.

The Chamber has regularly participated as *amicus curiae* in cases before this Court addressing employment law issues, including, most recently, *Federal Express Corp. v. Holowecki*, *cert. granted*, 127 S. Ct. 2914 (2007); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); *BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, *cert. granted*, 127 S. Ct. 852, *cert. dismissed*, 127 S. Ct. 1931 (2007); *Burlington Northern & Santa Fe Railway v. White*, 126 S. Ct. 2405 (2006); and *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006).

The Chamber's members have a substantial interest in this case, which will affect the course of the thousands of employment discrimination lawsuits filed in the federal

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. The parties have lodged letters with the Clerk expressing their blanket consent to the filing of *amicus* briefs.

courts each year. *See, e.g.*, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 166 (14,353 employment cases commenced between Sept. 30, 2005 and Sept. 30, 2006). The issue presented here—whether a district court may admit the testimony of employees who allege that they were discriminated against, but who are neither parties to the lawsuit nor were similarly situated to the plaintiff—is of great importance.

In the Tenth Circuit's view, such evidence is always admissible. If allowed to stand, the Tenth Circuit's decision will have serious adverse consequences for the Chamber's members, and all employers, because that rule dramatically expands both the scope of liability and the costs and potential unfairness of employment discrimination litigation.

## INTRODUCTION AND SUMMARY OF ARGUMENT

1. At its core, this case is about whether, in an individual disparate-treatment lawsuit, a company's liability may turn on allegations of discrimination made by non-parties. Unless such non-parties are similarly situated to the plaintiff (for example, if they share the same supervisor), the testimony of these other employees can never be relevant, for there is no logical connection between the employment decision the plaintiff is challenging and the decisions affecting the non-party witnesses. Because of this lack of connection, such evidence has no probative value. If non-party testimony is nonetheless admitted into evidence, there is a very real risk that employers will be held liable not only (or, indeed, not at all) for their conduct with respect to the plaintiff, but rather for alleged discrimination towards persons not before the court. As a result, such a rule would in effect alter the scope of liability under the federal anti-discrimination laws.

2. Even if this Court determines that non-party testimony has some marginal relevance, such evidence will almost always be inadmissible under Rule 403 of the Federal Rules of Evidence. "Me, too" evidence raises red flags as to nearly

every relevant consideration in the Rule 403 analysis. It is unfairly prejudicial because it tars defendants with alleged discrimination towards persons other than the one who brought the lawsuit. It confuses the issues in the case by distracting juries from the core question of whether the ***plaintiff*** was subjected to a discriminatory decision and instead focusing attention on other actors. And it makes employment discrimination cases more time consuming and more costly. Trials will grow in size and complexity as employers will be forced not only to defend the claim being litigated, but also to refute the allegations of all of the non-party employees who have been called to recite their own allegations of discrimination—and they will have to do so in case after case in which this traveling show of witnesses is called upon to perform.

3. Moreover, to admit such "me, too" evidence would encourage juries to punish employers for conduct directed at non-parties. The prejudice and harm that results from allowing juries to consider conduct that bears no relevance to the plaintiff's own claims implicates due process concerns of the type most recently recognized by this Court in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). As in the punitive damages context, fundamental fairness requires that employers not be subjected to an unreasonable risk of being held liable or punished because of conduct directed at non-parties.

4. If embraced by this Court, the Tenth Circuit's rule also would force companies to adopt inefficient, centralized management practices. Any employee's allegation of discrimination—whether true or simply perceived—could make its way into lawsuits filed by other employees, regardless of whether the alleged events are connected. In response, companies can be expected to centralize employment-related decisions rather than to delegate authority to those managers who are best situated to make the decisions, so that they can avoid the risk of a rogue supervisor's misconduct having a domino effect on lawsuits involving completely different supervisors. The Tenth Circuit's overbroad rule creates a justi-

fiable fear of liability that will encourage the adoption of bureaucratic and inefficient management practices.

## ARGUMENT

### I. Testimony By Non-Party Employees Who Allege That They Were Discriminated Against Is Inadmissible In Individual Disparate-Treatment Lawsuits.

In employment discrimination lawsuits, it is routine for individual plaintiffs to try to buttress their cases by proffering the testimony of other employees who allege that they, too, were the victims of discrimination. In rare cases such testimony may be appropriate, such as when the plaintiff and a non-party employee were terminated by the same decisionmaker. But much more commonly—as here—the plaintiff and the other employee are not similarly situated. Rather, the other employee works in a different department, does different work, and reports to a different supervisor. *See, e.g.*, Pet. Br. 4–5 (noting that none of the five proffered witnesses worked in the same group or within the same supervisory chain as Mendelsohn). Under such circumstances, the non-party's testimony should be excluded.

#### A. "Me, Too" Evidence Is Irrelevant In The Context Of Individual Employment Claims.

1. This Court has repeatedly explained that, in employment discrimination lawsuits, the question is whether the employer has made an adverse employment decision because of discriminatory animus towards the plaintiff. Hence, under the ADEA, when "a plaintiff alleges disparate treatment"—as here—"'liability depends on whether the protected trait * * * actually motivated the employer's decision.' * * * That is, the plaintiff's age must have 'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (brackets in original) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)); *accord, e.g., Price Waterhouse v. Hopkins*, 490 U.S.

228, 241–242 (1989) (plurality opinion) ("Congress meant to obligate [a plaintiff] to prove that the employer relied upon sex-based considerations in coming to its [employment] decision").

This Court has further recognized that employers make these decisions indirectly; that is, they act through their agents—and more specifically, through supervisors charged with making such decisions. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998) ("The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.").[2]

Thus, in an individual disparate-treatment case, the fundamental questions are (1) who made the decision and (2) whether that decisionmaker was motivated by discriminatory intent. *See generally* Pet. Br. 11–19 (discussing cases).

2. As to these questions, claims of discrimination by employees ***other*** than the plaintiff are irrelevant. Under Rule 401 of the Federal Rules of Evidence, evidence is relevant if it has "any tendency to make the existence of any fact that is ***of consequence to the determination of the action more probable*** or less probable than it would be without the evidence." Fed. R. Evid. 401 (emphasis added). "Whether or not a fact is of consequence is determined not only by the rules of evidence but by substantive law as well. * * * If the evidence is offered to prove a fact ***not in issue under substantive law*** then * * * it is * * * ***not relevant*** under Rule 401." 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 401.04(3)(b) (2d ed. 2007) (emphasis added).

---

[2] *See also Braswell v. United States*, 487 U.S. 99, 110 (1988) ("Artificial entities such as corporations may act only through their agents"); *CFTC v. Weintraub*, 471 U.S. 343, 348 (1985) ("As an inanimate entity, a corporation must act through agents.").

Here—as "in every employment discrimination case involving a claim of disparate treatment"—"[t]he ultimate question * * * is whether the ***plaintiff*** was the victim of intentional discrimination." *Reeves*, 530 U.S. at 153 (emphasis added). Therefore, for evidence to be relevant in such cases, it must bear on whether the supervisor who made the employment decision affecting the plaintiff did so because of discriminatory intent.

The non-party testimony that Mendelsohn sought to introduce does not come close to meeting that test. To be sure, the testimony of each of the other Sprint workers relates to whether the ***testifying*** worker was adversely affected for discriminatory reasons. But even assuming that some or all of these employees were actually the victims of discrimination, such facts are not "of consequence to the determination of [Mendelsohn's] action" (Fed. R. Evid. 401) because they have no logical connection to whether ***Mendelsohn's*** supervisor terminated ***her*** because of her age. *Cf., e.g., Haskell v. Kaman Corp.*, 743 F.2d 113, 122 (2d Cir. 1984) ("Since the testimony of the six former Company officers as to the circumstances of their terminations and those of other Company officers was insufficient to show a pattern and practice of discrimination, it was ***not relevant*** to the question of whether [plaintiff] Haskell was terminated for age-related reasons.") (emphasis added).

3. In nevertheless holding that the district court was required to admit the testimony of the five former Sprint employees, the court of appeals relied on faulty reasoning. In the court's view,

> the other employees' testimony is logically tied to ***Sprint's*** alleged motive in selecting Mendelsohn to the RIF. Although Mendelsohn and the other employees worked under different supervisors, Sprint terminated all of them within a year as part of an ongoing company-wide RIF. All the employees were in the protected age group, and their selection

> to the RIF was based on similar criteria. Accordingly, testimony concerning the other employees' circumstances was relevant to ***Sprint's*** discriminatory intent.

Pet. App. 9a–10a (emphasis added).

But this analysis is mistaken: It rests on the deeply flawed premise that the (allegedly) discriminatory intent of one supervisor is logically connected to the state of mind of other supervisors—and in particular, the supervisor who made the decision at issue in an individual lawsuit. That only makes sense if—contrary to all reason and experience—a corporation possesses a "collective intent" that can be divined by aggregating the states of mind of multiple unconnected supervisory employees. It is precisely that misconception that is at the core of the Tenth Circuit's ruling, which speaks of:

- "***Sprint's*** discriminatory animus toward older workers";
- "the employer's ***general*** discriminatory propensities"; and
- an "***atmosphere*** of age discrimination."

Pet. App. 5a, 14a (emphases added).

Yet allegations of discrimination in the air—like "'[p]roof of negligence in the air'"—"'will not do'" (*Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928) (Cardozo, J.) (quoting POLLOCK, THE LAW OF TORTS 455 (11th ed. 1920)). As Judge Tymkovich recognized in his dissent, "[g]iven the size of Sprint, the fact that Mendelsohn found five former employees who believed [that] they were victims of age discrimination is not meaningful until a specific ***evidentiary foundation*** has been laid"—*i.e.*, "independent evidence showing that Sprint had company-wide discriminatory policies." Pet. App. 20a (emphasis added). By reaching a contrary conclusion and holding that the five employees' distinct allegations of discrimination provide that

foundation, the court of appeals made an unwarranted inferential leap.[3] Rule 401 requires more—specifically, a logically supportable connection rather than generic speculation. Because the testimony of non-party witnesses who are not similarly situated to an individual plaintiff lacks that connection, it is irrelevant, and this Court should hold it inadmissible. *See* Fed. R. Evid. 402 ("[e]vidence which is not relevant is not admissible").[4]

---

[3] To support its conclusion that non-party testimony is admissible to establish that an employer has "general discriminatory propensities" (Pet. App. 5a), the Tenth Circuit cited this Court's statement that an employer's "general policy and practice with respect to minority employment" "may be relevant to any showing of pretext." Pet. App. 6a (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973)). But the next sentence in *McDonnell Douglas* clarifies that "***statistics*** as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." *Id.* at 805 (emphasis added). It is accordingly Judge Tymkovich's ***dissent*** that accords with *McDonnell Douglas*. *See* Pet. App. 20a (noting the "lack of any statistical or other direct evidence that supports an inference of enterprise-wide discrimination").

[4] Such a holding would not derail cases in which a plaintiff alleges a "pattern or practice" of discrimination—cases that are most commonly brought as class actions. *See* 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 44 n.168 (3d ed. 1996) ("Pattern-or-practice suits, by their very nature, involve claims of classwide discrimination"). As this Court has observed:

> The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while "at the liability stage of a pattern-or-practice trial the focus often will not be

### B. Even If "Me, Too" Evidence Has Marginal Relevance, Federal Rule Of Evidence 403 Generally Requires Exclusion Of Such Evidence In Individual Disparate-Treatment Cases.

As petitioner observes, Rule 403 provides an independent ground for holding that the testimony of non-parties alleging discrimination is inadmissible. *See* Pet. Br. 39–45. Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. When the "me, too" witnesses are not similarly situated to the plaintiff in an individual disparate-treatment case, the balancing required by Rule 403 will virtually always require exclusion of the "me, too" testimony.

1. It is predictable—indeed, highly likely—that the admission of "me, too" evidence will visit unfair prejudice on defendants. In every employment discrimination lawsuit in which such evidence is introduced, the company will be put on trial not only for its actions towards the plaintiff herself, but also for how it treated any other employee who testifies that he or she was a victim of discrimination. No longer would a plaintiff's claim stand or fall on its own merits. Rather, the fates of the plaintiff's claim and the employer's defense would each be inextricably linked to other employees' separate claims.

Moreover, by force of numbers, the employer would be placed at a distinct—and perhaps insuperable—disadvantage. The plaintiff's own case, no matter how weak, will be

---

on individual hiring decisions, but on a pattern of discriminatory decisionmaking."

*Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (quoting *Teamsters v. United States*, 431 U.S. 324, 360 n.46 (1977)).

strengthened significantly by the vivid, passionate allegations of discrimination recited by other employees of the company. That will be the case regardless of the merits of the non-parties' allegations. Despite the lack of connection to the plaintiff's own claims, the steady drumbeat of allegations of discrimination will have the foreseeable effect of reinforcing the plaintiff's claim, thereby unduly prejudicing the employer. What jury could refrain from thinking that there must be a fire, when so much smoke is thrown up? Thus, as one district judge explained in a frequently cited opinion, even the "strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant had laid him off because of his age." *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 393 n.4 (E.D. Pa.), *aff'd*, 639 F.2d 774 (3d Cir. 1980) (table).

2. Relatedly, it is a veritable certainty that the introduction of testimony by non-party witnesses will confuse and mislead juries. Employers will be forced to square off not against the plaintiff herself, but rather against a "fictional composite" plaintiff whose claims might be "much stronger than any plaintiff's individual action would be." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (Wilkinson, C.J.) (recognizing procedural unfairness of having to defend against a class action involving "fictional composite" plaintiff).[5] These concerns are even greater in the context of an individual lawsuit that—as

[5] Describing concerns similar to those expressed in *Broussard*, Judge Posner has explained: "In effect the appeal asks us to graft [one named plaintiff's] timely filing with the EEOC onto [another named plaintiff's] untimely but not-yet-shown-to-be-unmeritorious discrimination case to create a composite plaintiff to represent the class of blacks denied employment by the defendant. We cannot find any basis in law or good sense for such ghastly surgery. Neither plaintiff is a suitable class representative, and zero plus zero is zero." *Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157 (7th Cir. 1999).

here—does not allege a "pattern and practice" of discrimination. *See also* note 3, *supra*. The decision below invites the same type of logically unconnected comparisons, by allowing an individual plaintiff to bolster her case with facts from other incidents involving other decisionmakers.

3. Furthermore, admitting the testimony of non-party employees will poorly serve judicial economy. The practical consequence of the Tenth Circuit's rule, which calls for the routine introduction of such evidence, will be to make employment litigation more protracted and expensive.[6] A company will be forced to refute the allegations of every non-party witness who claims to be the victim of discrimination. Indeed, even a small contingent of former employees who claim discrimination would take on outsized importance at trial.[7] To place these complaining witnesses in their proper context vis-à-vis the entire workforce, an employer would need to offer its own witnesses to testify about the decision-making process for each and every "me, too" witness, as well as for the many employees affected by the job action who have not claimed to have been victimized by discrimination. And it might also need to introduce evidence about the individuals within the protected class who were not affected by the job action. Conceivably, a company could—and perhaps

---

[6] In describing the potential impact of this case, one law firm that specializes in employment defense noted: "The real issue – will we have 10 day jury trials or 60?" Hanna, Brophy, MacLean, McAleer, & Jensen, LLP, *U.S. Supreme Court will be final arbiter of "me-too" evidence in discrimination trials*, at http://www.hannabrophy.com/index.cfm?fuseaction=content.contentDetail&ID=8630&tID=297 (last visited Aug. 17, 2007).

[7] The facts in this case are illustrative. The plaintiff hand-picked five witnesses who were prepared to testify that they were discriminated against by other decisionmakers at Sprint. These individuals were needles in the haystack of approximately 15,000 employees who were released by Sprint as part of a series of reductions in force over an 18-month period. Pet. Br. 2.

should—offer such testimony from dozens of its current and former employees. But even that might not suffice to counter the indelible impression created by a handful of non-party witnesses who accuse the company of discriminating against them.

Of course, such proceedings would take a long time. Yet most civil trials are conducted under strict time limitations, and for good reason: most civil juries don't have the time or patience to sit through a trial of three months or longer. But that is what would be required for a defendant to have a reasonable chance of rebutting the array of inflammatory allegations of discrimination that plaintiffs will seek to unleash via non-party proxies.

Moreover, even if district courts could give defendants the time they would need to respond to multiple charges of discrimination—and it is hard to see where courts would find the time—it would place defendants between a rock and a hard place. It is common sense that, by responding to each non-party's allegations of discrimination, a defendant risks dignifying them in the eyes of the jury. The choice a defendant would face—between (1) defending against every accusation thrown at it, which risks suggesting to the jury that the defendant has something to be concerned about, and (2) making what amounts to a general denial, which risks causing the jury to conclude that the defendant has no good defense of its practices—tilts the litigation playing field dramatically and unjustifiably in favor of the plaintiff.[8]

This imbalance will have another deleterious effect: Employers will be forced to settle even meritless lawsuits. As we

---

[8] As one practitioner has explained, "if such ["me, too"] testimony is admitted, the defendant would have the Hobson's choice of defending each situation or leaving the testimony unrebutted, either of which is prejudicial." Charles C. Warner, *Motions in Limine in Employment Discrimination Litigation*, 29 U. MEM. L. REV. 823, 829 (1999).

have noted, if "me, too" witnesses are allowed to testify, trials will become bloated and expensive affairs, and consequently the cost to litigate a trial that goes on for weeks could approach or exceed the damages that a plaintiff might receive. *See, e.g.*, 42 U.S.C. § 1981a(b)(3)(D) (limiting compensatory damages that can be awarded under Title VII against large employers to $300,000). In other words, even if an employer prevails at trial, in a sense it still loses because of the substantial expense necessary to defend itself. That is especially so because prevailing defendants in employment discrimination cases almost never recover attorneys' fees. For example, under Title VII, attorneys' fees may not be awarded to a prevailing defendant unless there is a "finding that the plaintiff's action was frivolous, unreasonable, or without foundation" or that the "plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421–422 (1978); *see also Monroe v. Children's Home Ass'n of Ill.*, 128 F.3d 591, 594 (7th Cir. 1997) (Easterbrook, J.) ("Fee-shifting provisions in the civil rights laws are asymmetric. Prevailing plaintiffs recover their fees routinely, while defendants recover only if the plaintiff's claim is frivolous.").[9] Hence, plaintiffs will have leverage to demand—and often will receive—sizeable settlements in even the weakest of cases, because the costs of litigating against both a plaintiff and her "me, too" witnesses will simply be too high.

* * * * *

As a categorical matter, the costs from admitting non-party testimony "substantially outweigh[]" the minimal—if any—probative value from that evidence. If the Court does

[9] *Cf. Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1437 (11th Cir.) (citing cases and holding that "a district court may award attorneys' fees to a prevailing ADEA defendant only upon a finding that the plaintiff litigated in bad faith"), *cert. denied*, 525 U.S. 962 (1998).

not hold that such evidence is irrelevant (*see* Part I(A), *supra*), it should hold that such evidence virtually always fails Rule 403's balancing test.

## II. Allowing Non-Parties To Testify About Alleged Discrimination Raises Concerns About Fundamental Fairness Because Such Testimony Invites Juries To Base Liability On Perceived Harms To Persons Other Than The Plaintiff.

To allow the introduction of "me, too" evidence is troublesome for the additional reason that it invites juries to impose liability for alleged harms to parties not before the district court—thereby threatening companies' right to a fair trial. Just last Term, this Court explained in a related context that "fundamental due process concerns" are raised when a jury "use[s] a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063, 1064 (2007). In particular, the Court noted three concerns: the "risks of arbitrariness, uncertainty and lack of notice." *Id.* at 1063. Here, those concerns are, if anything, heightened because the plaintiff seeks to prove her ***own*** cause of action by reference to alleged acts directed at others. Petitioner does not frame the issue in Due Process terms, and the Court can resolve this case under the Federal Rules of Evidence without resort to constitutional grounds. Nevertheless, it remains "important for a court to provide assurance that the jury will ask the right question, not the wrong one." *Id.* at 1064. Yet the rule announced below—and for which Mendelsohn presumably will advocate—virtually ensures that juries will ask, and answer, the wrong question. Rather than focusing on the merits of the specific allegations of the plaintiff at hand, juries are invited to base their finding of liability and "punish [a defendant] for harm caused [to] strangers [to the litigation]." *Id.*

This Court did hold in *Williams* that, in the context of assessing punitive damages, evidence of harm to others aris-

ing from ***the same conduct*** "can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Id.* But evidence of ***different*** conduct aimed at nonparties has no role to play in setting punitive damages (*see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422–423 (2003)), much less in determining liability in individual disparate-treatment cases. In such cases, the plaintiff does not—and cannot—claim that the employer's decision was part of a single course of conduct that "posed a substantial risk of harm to the general public" (*Williams*, 127 S. Ct. at 1064). Rather, the plaintiff's claim relates only to herself; her purpose in offering evidence of distinct conduct directed at others is to lighten the burden of persuading the jury that there was discrimination against her. Therefore, any jury that considered this evidence would be doing precisely what *Williams* forbids: "punish[ing] a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.*

By insisting that other employees' allegations of discrimination be placed front and center before juries—no matter how attenuated the link to the plaintiff—the Tenth Circuit mandated a "procedure[] that create[s] an unreasonable and unnecessary risk of [jury] confusion occurring." *Id.* at 1065. For the reasons we have explained, that risk is both very real and wholly unnecessary.

## III. Allowing The Use of "Me, Too" Evidence Will Force Companies To Adopt Less Efficient Management Practices.

If the rule announced by the court of appeals were adopted, businesses would be required to react to the prospect of increased liability that attends the widespread admissibility of "me, too" evidence by adopting burdensome, less effective management practices.

**A.** Although framed as an evidentiary holding, the Tenth Circuit's rule effectively alters the substantive grounds

for liability under the employment discrimination laws. Under that rule, the outcome of employment lawsuits no longer turns on whether a decision concerning the ***plaintiff*** was made for a discriminatory reason. Instead, a company must assume that it will be held liable if a jury believes that ***any*** of the proffered witnesses was subject to a discriminatory decision.

This pattern will repeat: Any former employee who believes that he was a victim of discrimination could testify not only at his own trial but also in any other employment case brought against his former employer. And, for the reasons we have explained, a chorus of such allegations—whether or not they are true—will create a substantial risk that the employer will be held liable regardless of whether the plaintiff was herself subjected to a discriminatory decision. In other words, juries may well mulct companies not because they have discriminated against particular plaintiffs, but rather because companies have failed to root out all (allegations of) discrimination. And that being so, it is predictable that plaintiffs and their counsel will file more—and less meritorious— lawsuits secure in the knowledge that they can bolster their cases with the allegations of other employees.

**B.** If "me, too" evidence is admissible, then any employee's allegations of discrimination will likely have ripple effects in many other discrimination lawsuits.

Many companies will therefore consider themselves compelled by the potential for expanded liability and litigation costs to engage in "defensive medicine" in an effort to avoid any risk that any of its employees will later ***allege*** discrimination.[10] For example, it is predictable that some com-

[10] Even without the added burden of "me, too" evidence being admissible *per se*, as the Tenth Circuit's rule would require, companies already have trouble terminating problem employees. As one recent article explained, "[m]any companies today are gripped by a fear of firing. Terrified of lawsuits, they let unproductive employ-

panies will give up entirely on making performance-based determinations and instead will embrace an economically inefficient "last hired/first fired" approach. Others may feel compelled to centralize their employment decisions, removing authority and responsibility from on-the-ground managers, in the hope of ensuring that thousands of decisions are not tainted by the poor judgment of a single supervisor somewhere in the country or world.[11]

That result runs counter to the long-recognized management principle that decentralized decisionmaking is preferable. It makes sense to vest authority in mid- and lower-level managers who are most closely acquainted with the nature of their work, the needs of their projects, and the skill sets of their team members. As one Nobel Prize winning economist observed over four decades ago, "individual managers will inevitably know more about their own spheres of activity than higher officials"; accordingly, "decentralization can improve the allocation of responsibility" because a "subordinate has greater possibilities of initiative" while "his successes and failures can be more easily recognized by top management." Kenneth J. Arrow, *Control in Large Organizations*, 10 MGMT. SCI. 397, 400 (Apr. 1964). In short, decentralized decisionmaking is more nimble and hence more likely to produce better, more efficient outcomes. But the use of such highly effective management practices will be threatened if

---

ees linger, lay off coveted workers while retaining less valuable ones, and pay severance to screwups and even crooks in exchange for promises that they won't sue." Michael Orey, *Fear of Firing: How the threat of litigation is making companies skittish about axing problem workers*, BUS. WEEK (Apr. 23, 2007), at 54.

[11] A number of large companies may face significant difficulties in making the transition to centralized personnel decisionmaking. Indeed, it may be impossible for some large companies to do so because of the size of their operations, which are often nationwide, if not transnational, in scope. These companies may have no choice other than the "last hired/first fired" method.

this Court sustains the Tenth Circuit's broad extension of substantive liability under the discrimination laws.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBIN S. CONRAD
SHANE BRENNAN
*National Chamber Litigation Center, Inc.*
*1615 H Street, N.W.*
*Washington, DC 20062*
*(202) 463-5537*

EVAN M. TAGER
*Counsel of Record*
ARCHIS A. PARASHARAMI
*Mayer, Brown, Rowe & Maw LLP*
*1909 K Street, NW*
*Washington, DC 20006*
*(202) 263-3000*

*Counsel for Amicus Curiae*
*Chamber of Commerce of the United States of America*

AUGUST 2007